

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

R&P SEAFOOD/SHELLFISH, INC. &
FOUR SEAS, INC.

Plaintiffs

V.

KENNEBUNK SAVINGS BANK.

Defendant

Case No. 05-cv-10420-MLW

DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE TESTIMONY OF RICHARD A. CLARKE

NOW COMES Defendant, Kennebunk Savings Bank, (hereafter “the Bank” or “KSB”) by and through its attorneys, Thompson & Bowie, LLP, and pursuant to the Court’s Order Setting Case for Trial dated March 1, 2006, *see* Docket at Entry No. 21, hereby submits its motion in limine to bar testimony of Richard A. Clarke as follows.

Background

Plaintiffs have designated Mr. Clarke to testify as an expert in this matter. *See* Exhibits 1-2, Plaintiffs' Expert Witness Disclosure with attached Plaintiffs' Expert Witness Report. Mr. Clarke was deposed by counsel for KSB in this matter on April 12, 2006. *See* Exhibit 3, Transcript of Deposition of Richard A. Clarke. In sum, Mr. Clarke intends to challenge the Bank's statements in the October 2004 letter regarding the status of the Preble account and address his purported knowledge of banking industry standards, as outlined in his Report. *See* Exhibit 2 at first two pages. While Mr. Clarke began working in banking in 1969, he has not worked in a bank since 1991; instead, he provides consulting services and serves as an expert witness. *See id.* at curriculum vitae.

Argument

Richard Clarke should be barred from testifying as an expert in this case. He has demonstrated that he is not qualified to provide expert opinions and his opinions lack adequate foundation. His proffered testimony is not sufficiently reliable. Nor does it satisfy the special relevancy requirement for admission of expert testimony. *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77 (1st Cir. 1998). He does not support his contentions with adequate methodology, and to the extent he attempts to support his testimony with personal experience, he does not explain how his “experience led to the conclusion[s] reached, why that experience [is] a sufficient basis for the opinion, and how that experience [is] reliably applied to the facts.” Fed.R.Evid. 702, Advisory Committee Note. Rather, he simply presents inappropriate *ipse dixit*¹ testimony. Moreover, the information proffered does not require an expert’s analysis.

Before the Plaintiffs may use the testimony of Richard Clarke they must establish a proper foundation under Rule 702 of the Federal Rules of Evidence and satisfy the *Daubert* trilogy. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1997); and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. It provides that a proposed expert witness must be sufficiently qualified to assist the trier of fact, and that his expert testimony must be relevant to the task at hand and rest on a reliable basis:

¹ “Ipse dixit: He himself said it; a bare assertion resting on the authority of an individual.” Black’s Law Dictionary (6th ed. 1990).

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Under *Daubert*, the Court makes a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts at issue.” *Daubert*, 509 U.S. at 592-93. Many factors may bear on this inquiry, for example whether a scientific technique has been subjected to peer review and whether it has received general acceptance. *See id.* at 593-94. This so called “gate keeping” obligation applies to all types of expert testimony, not just “scientific” testimony. *See Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137 (1999).

In *Daubert* the Supreme Court stressed the importance of the trial court’s gate keeping function:

[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than lay witnesses.

Daubert, 509 U.S. at 595. The issue is:

whether “(a) the opinions and conclusions of the expert are accompanied by information that enables the factfinder to evaluate

the likely accuracy of the expert's opinion, and (b) the information is presented in such a way that the factfinders will not be fooled into excessively overvaluing the testimony."

United States v. Green, 405 F.Supp.2d 104, 119 (D.Mass. 2005) (J. Gertner).

In addition to assessing the expert's qualifications to render an opinion, the Court must also consider the reliability of the proffered scientific testimony. Specifically, the Court considers:

1. whether the opinion has or is capable of being tested;
2. whether the theory or technique upon which the opinion is based has been subject to publication and peer review;
3. whether the theory has a known or potential rate of error;
4. whether any standards exist to control the operations of the technique;
5. whether facts and data relied upon are of a type reasonably relied upon by experts in the particular field; and
6. the general acceptance of the scientific theory.

See, e.g., Sutera v. Perrier Group of America, Inc., 986 F.Supp. 655, 661 (D. Mass. 1997) (J. Saris).

Whether *Daubert's* suggested indicia of reliability apply to any given testimony depends on the nature of the issue at hand, the witness's particular expertise and the subject of the testimony. *See Kumho*, 526 U.S. at 147-51. It is a fact-specific inquiry. *See, e.g., Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999). The Court's responsibility "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field". *Kumho*, 526 U.S. at 152.

Notwithstanding any expert's qualifications, the Court must ensure that there is some scientific methodology involved in the conclusions that are reached. For example, as stated in *Smith v. Ford Motor Company*, 215 F.3d 713 (7th Cir. 2000):

In analyzing the reliability of proposed expert testimony, the role of the court is to determine whether the expert is qualified in the relevant field and to examine the methodology the expert has used in reaching [her] conclusions . . . A court's reliability analysis does not end with its conclusion that an expert is qualified to testify about a given matter. Even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some scientific method."

Smith, 215 F.3d at 718 (quoting *Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th Cir. 1999)). Clarke is seeking to "waltz" here. His opinions are not based on methodology. His opinions are simply what he believes to be true based on his impressions of banking from working in commercial lending many years ago and his general references to the Risk Management Associates trade organization. Yet, as the Court has recognized:

The issue is not whether the field in general uses a reliable methodology, but the reliability of the expert's methodology in *the case at bar*, i.e. whether it is valid for the purposes for which it is being offered, or what the Court has described as the question of "fit."

See United States v. Green, 405 F.Supp.2d 104, 119 (D.Mass. 2005) (J. Gertner) (emphasis in original). Clarke has demonstrated that he is not employing any reliable methodology in this case, as demonstrated in the sample excerpts from his testimony cited below.

The *Daubert* admissibility analysis does not require the Plaintiffs to establish that the expert is correct in his conclusions, rather they must show that his opinions have sufficient indicia of reliability to warrant presentation to a jury:

Daubert does not require that the party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.

Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998). Clarke fails to meet this standard.

The Supreme Court has made plain that gate keeping requires more than taking the expert's word for it:

Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit*² of the expert.

General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997). Mr. Clarke's proffered testimony is the type of *ipse dixit* testimony that the Supreme Court in the *Daubert* trilogy sought to eliminate. *Cf., e.g., Brown v. Wal-Mart*, 402 F.Supp.2d 303, 307-310 (D.Me. 2005) (applying *Daubert* trilogy, discussing same).

Finally, under the "special relevancy requirement" for the admission of expert testimony the First Circuit explained in *Ruiz-Troche*, the testimony must not only be relevant under Fed.R.Evid. 402, but also in the "incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or

determine a fact in issue. In other words, Rule 702, as visualized through the *Daubert* prism, requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Ruiz-Troche*, 161 F.3d at 81 (quoting *Daubert*, 509 U.S. at 592). Since Clarke’s opinions are scientifically unreliable, this deficiency makes them irrelevant and inadmissible—they will not assist the trier of fact.

Clarke’s deposition testimony makes plain that he fails the *Daubert* trilogy standards for admissibility of expert evidence. He only vaguely references “industry practice” and “Robert Morris Associates” or “Risk Management Associates” in his deposition, does not provide concrete support and specific methodology for his opinions and is unaware of state guidelines addressing the confidentiality of commercial credit information held by banks. *See*, Clarke Deposition, (Exhibit 3), *passim*; *see, e.g., id.* at p. 43 lines 9-10 (is not a member of RMA [Risk Management Associates]); p. 45 lines 4-10 (does not hold the industry CRC, Credit Risk Certified, designation and does not know what it is); p. 49 lines 13-15 (has not given a lot of thought as to what the Bank should have done in response to Preble’s request for a letter); p. 57 line 22 – p. 60 line 13 (unable to articulate industry standards); p. 60 line 14 – p. 66 line 9 (gives his own assessment that caveats should have been added to use of characterizations provided for in the RMA industry guidelines; demonstrates lack of familiarity with Maine banking standards and non-specified knowledge of Massachusetts standards—*see also* p. 17 line 21 – p. 18 line 20); and *see generally, e.g.,* p. 18 line 1 – p. 20 line 12 (inability to identify source of data referred to and failure to articulate standards at deposition and expression of intent to research information later).

In sum, Clarke presents conjecture and hypotheses without demonstrating any authoritative basis for his opinions. Repeatedly, when asked for the bases underlying his opinions, Clarke provided no information or indicated he intended to find information, but could not cite it in his testimony. As the First Circuit has noted, “expert opinions, however, are no better than the data and methodology that undergrid them.” *See SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp.*, 188 F.3d 11, 25 (1st Cir. 1999). As the *SMS* Court explained further: “an expert must vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with standards of the expert’s profession.” *Id.* citing *Wessman v. Gittens*, 160 F.3d 790, 804-05 (1st Cir. 1998), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)). Clarke can not meet these standards.

As the *SMS* Court recognizes, “expert testimony that offers only a bare conclusion is insufficient to prove the expert’s point.” *SMS*, 188 F.3d at 25 (citing *Mid-State Fertilizer Co. v. Exchange Nat’l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) (“An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.”)). As the *Mid-State* Court explained:

“Expertise is a rational process and a rational process implies expressed reasons for judgment.” *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 . . . (1944) (Frankfurter, J. dissenting). . . An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. . .

. . .

Bryan [the expert] offered the court his CV rather than his economic skills. Judges should not be buffaloed by unreasoned expert opinions. . . The importance of safeguarding the integrity of the [judicial] process requires the trial [or appellate] judge, when

he believes that an expert's testimony has fallen below professional standards, to say so, as many judges have done.

Mid-State, 877 F.3d at 1340 (additional citations omitted). Mr. Clarke's proposed testimony has no indicia of meeting the standards required by the Federal Rules of Evidence. It is plainly inappropriate *ipse dixit* which the Supreme Court has unequivocally stated is improper. It should be excluded.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that this Motion in *Limine* be granted and that the Court enter an order excluding testimony of Richard A. Clarke.

Dated at Portland, Maine this 30th day of May, 2006.

/s/ Lisa F. Bendetson

Lisa F. Bendetson, Esq. (BBO#567069)

/s/ James M. Bowie

James M. Bowie, Esq.
Attorneys for Defendant, Kennebunk Savings Bank

THOMPSON & BOWIE, LLP

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Portland, ME 04112
(207) 774-2500

CERTIFICATE OF SERVICE

I, James M. Bowie/Lisa F. Bendetson, attorney for Defendant, Kennebunk Savings Bank, hereby certify that I made service of the foregoing document titled: “Defendant’s Motion in Limine to Exclude Testimony of Richard A. Clarke” with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following: Marc D. Kornitsky, Esq., and I hereby certify that on this date I did not mail by the United States Postal Service, said submission to non-registered participants as there are no non-registered participants for this case.

Dated at Portland, Maine, this 30th day of May, 2006.

/s/ Lisa F. Bendetson

Lisa F. Bendetson, Esq. (BBO#567069)

/s/ James M. Bowie

James M. Bowie, Esq.
Attorneys for Defendant, Kennebunk Savings Bank

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

R & P SEAFOOD/SHELLFISH, INC., and,
FOUR SEAS, INC.

Plaintiffs,

v.

CIVIL ACTION NO. 05-cv-10420-MLW

KENNEBUNK SAVINGS BANK,

Defendant.

PLAINTIFFS' EXPERT WITNESS DISCLOSURE


Pursuant to Rule 26(a), plaintiffs in the above action make the following disclosure of expert information. Plaintiffs intend to use Richard A. Clarke, 14 Douglass Green, Woburn, MA 01801-5377 as an expert at trial. Plaintiffs attach Mr. Clarke's written and signed Report ("Mr. Clarke's Report") hereto.

Mr. Clarke's Report contains a complete statement of all opinions to be expressed and the basis and reasons for such opinions, subject to continuing discovery and information related to the action. Mr. Clarke attaches his curriculum vitae, including his published works and qualifications to his Report. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years is included. Mr. Clarke reviewed the deposition transcripts of Joel Stevens and Eric Andrews and all exhibits thereto.

Plaintiffs (together with Portland Shellfish, Inc., a litigant in a similar case in Maine) have paid a total retainer in the amount of \$2,250 to Mr. Clarke and are paying him at an hourly rate of \$240.

Plaintiffs reserve their right to designate additional experts in rebuttal to any designation made by the Defendant or to supplement this current designation in the event Mr. Clarke forms additional or different opinions, the substance of the testimony changes and/or he relies on documents outside of those identified herein.

RESPECTFULLY SUBMITTED,
R&P Seafood/Shellfish, Inc. and Four Seas, Inc.
By its attorneys,
Antico, Barrett, Burke & Kornitsky LLP



Marc D. Kornitsky, Esq.
One Essex Green Drive
Peabody, MA 01960
(978) 532-5140

Dated: November 28, 2005

CERTIFICATE OF SERVICE
I hereby certify that on this date, 11-28-05 that a true
copy of the above document was served upon ~~for each party~~
~~appearing pro se and/or~~ the attorney of record of each party
by mailing postage prepaid-certified mail return receipt requested
~~/by hand/constable~~



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Defendant.

CIVIL ACTION NO. 05-cv-10420-MLW

PLAINTIFFS' EXPERT WITNESS REPORT

Opinions and basis therefore

I anticipate testifying that the accounts of Robert J. Preble & Sons, Inc. ("Preble") at Kennebunk Savings Bank (the "Defendant") were not handled in a "satisfactory manner," as such term is defined by applicable banking guidelines and that the Defendant failed to provide sufficient information to Plaintiffs concerning the meaning of terms used in the letters addressed to Plaintiffs dated October 8, 2004 (the "October Letter") as required by applicable banking standards and guidelines. This opinion will be grounded upon the documents identified below and my experience.

I anticipate testifying that Defendant was obligated to inform Plaintiffs of any material adverse changes to Preble's financial condition after the issuance of the October Letter. This opinion will be grounded upon the documents identified below and my experience.

I anticipate testifying that Preble did not comply with its contractual commitments and that Preble's alleged compliance with Preble's contractual commitments under relevant loan documents does not mean that the accounts of Preble were handled in a "satisfactory manner" in the commercial lending context. This opinion will be grounded upon the documents identified below and my experience.

I anticipate testifying that it is ordinary practice in the banking industry not to volunteer to provide financial information relating to a customer that has not been requested by the third-party. This opinion will be grounded upon the documents identified below and my experience.

I anticipate testifying that it is not ordinary practice in the banking industry to volunteer to issue multiple letters concerning credit information at one time and to permit the bank customer to hand deliver such letters. This opinion will be grounded upon the documents identified below and my experience.

I anticipate testifying that the Defendant failed to provide the Plaintiffs with relevant information relating to the financial condition of Preble when the Defendant issued the October Letters. While banks are not obligated to respond to requests for credit information, they must provide a complete answer if an answer is proffered. This opinion will be grounded upon the documents identified below and my experience.

Data and other information considered by the witness in forming the opinions

1. The Deposition Transcript of Joel Stevens, including exhibits attached thereto
2. The Deposition Transcript of Eric Andrews, including exhibits attached thereto
3. Any and all documents produced by the Defendant during discovery

4. Materials relating to the guidelines promulgated by Risk Management Associates, formerly known as, Robert Morris Associates

Qualifications

As my attached resume, description of current activities and client list indicate, I have considerable commercial banking experience, with specific expertise regarding commercial lending and resolution of problem loans. I am also familiar with the New England and national banking market by virtue of my long-term involvement with banks and borrowers active throughout the nation.

My banking career began in 1969 when I entered the credit training program at the First National Bank of Boston (Bank of Boston), a major national and international commercial lender throughout the past three decades. Subsequent assignments included a lengthy internship in the problem loan unit which involved the resolution of numerous problem credit exposures. A significant number of these relationships were based in the Northeast and required knowledge of all phases of commercial credit including standards for answering trade credit inquiries.

In the early 1980's, my responsibilities grew to include management not only of the bank's problem loan unit but also the emerging corporate loan review function. This provided me with direct credit management experience over hundreds of commercial loans with broad exposure to all types of individuals, businesses and their related equity and real estate holdings.

From 1986-1989, as Senior Credit Officer for New England, I supervised approximately \$3 billion in commercial loans as well as \$5 billion in consumer loans. My duties included continued oversight of problem New England credit exposures as well as loan operations. Any credit related issues arising in the various BKB trust units were also brought to me for resolution.

During this period, I was named a Director of Casco Northern Corp. and also sat on the Director's Loan Committee. In 1987, I led the Bank of Boston due diligence team which prepared the analysis for the subsequent acquisition of Bank of Vermont. I also acted as Senior Credit Officer for Casco-Northern Bank, Bank of Vermont, Rhode Island Hospital Trust and Bank of Boston, Connecticut (formerly Colonial Bank).

When Bank of Boston's Real Estate Group was cited unfavorably by federal regulators in August of 1989 (as were many other Northeast banks), I was selected by senior management to become Senior Credit Officer of that unit to institute reforms. This assignment added to my real estate knowledge and required me to continue to supervise real estate exposures all around the nation and housed within the various Bank of Boston affiliated banks. I also remained involved in quarterly loan review meetings for all commercial and private banking problem loans throughout New England including on site visits to Casco Bank.

I have chaired the Bank of Boston New England Credit Committee (1986-1989) and Real Estate Credit Committee (1990-1991), been a member of the Bank of Boston Senior Credit

Committee (1986-1991) and supervised the activities of the various credit committees of Bank of Boston subsidiary banks (1986-1991).

As a result of my performance in the foregoing assignments, I was named Chairman of the Robert Morris Associates (RMA) National Real Estate Credit Roundtables in both 1990 and 1991. RMA is the nation's leading professional association of bank lending and credit officers. RMA-sponsored roundtables permit the annual exchange of state-of-the-art banking information, ideas and practices, and are attended by dozens of representatives from the nation's leading banks in each topical area. Since resigning from Bank of Boston, which remains a major client along with its successor Fleet, I have acted as moderator of numerous RMA Roundtables focusing on all phases of bank lending. I wrote and in 1993 RMA published "The Workout Manual" which advises banks as to how to minimize loan losses once a problem has developed.

RMA has been the leading source of banking industry standards for the exchange of commercial credit information for almost 100 years.

Since 1991, I have provided consulting services to approximately thirty-five banks and other financing intermediaries as well as a similar number of bank customers. Therefore, I have had continued experience with banking transactions nationally and in the Northeast region from 1969 right up the present date.

I have lectured frequently throughout the nation on all phases of commercial lending and have given numerous presentations to thousands of commercial lenders over the past two decades covering all types of banking transactions and including loan workout. In late 1986, I participated in a Lender Liability Panel Discussion sponsored by the RMA, the video of which received broad national distribution and, today, I am generally recognized as a leading expert in this area.

Over the past decade, I have been retained to offer abbreviated credit seminars to the various Bank of Boston units in existence at that time. In 1998, a similar seminar was provided to the Key Bank entity which had acquired Casco Bank.

My RMA duties, bank and business consulting assignments have exposed me to a broad cross section of regional and national business and banking transactions. Therefore, I am intimately familiar with the type of circumstances faced by lenders to troubled companies and the credit references provided by Kennebunk Savings Bank.

Publications authored by the witness within the preceding ten years

"It Pays to Know Your Real Estate Borrower", Commercial Lending Newsletter, Robert Morris Associates, May, 1991.

The Workout Manual, published by Robert Morris Associates, 1993.

"Current Bank Workout Perspectives", Turnaround & Workouts Survey, Beard Group, published February 15, 1994.

"Financing Local Business", a monthly column published during 1994 by the Woburn Advocate,

Winchester Town Crier and Stoneham Sun.

"Credit Marketing: The Antidote for Imprudent Credit Standards", Lending and Risk Management News, Robert Morris Associates, March, 1997.

"Top 10 Rules of the Road for Lenders", Lending and Risk Management News, Robert Morris Associates, September, 1997.

"Outside Resources Can Assist Management of Underperforming Borrowers", Lending and Risk Management News, Robert Morris Associates, January, 1998 and Kentucky Banker Magazine, March, 1998.

"Evaluate Performance Risk of All Contractors Carefully", Lending and Risk Management News, Robert Morris Associates, July, 1998.

"Compliance Risk Must Be Handled Effectively", Lending and Risk Management News, Robert Morris Associates, September, 1998.

"Practice Prevailing Banking Standards to Avoid Lender Liability Risk", Lending and Risk Management News, Robert Morris Associates, December, 1998.

"How to Determine the Debt/Equity Equation", Robert Morris Associates, featured on RMA Website beginning the week of 3/18/99, www.rmahq.org.

"Millennium Moments", Robert Morris Associates, featured on RMA Website beginning the week of 10/18/99, www.rmahq.org.

"Credit Negotiations", The Journal of Lending and Credit Risk Management, Robert Morris Associates, May, 2000.

"The Asset Based Lending Credit Crunch", The Journal of Lending and Credit Risk Management, Robert Morris Associates, December, 2000.

"Ten Principles Should Govern Commercial Problem Loan Resolution", The Journal of Lending and Credit Risk Management, TheRisk Management Association (formerly known as Robert Morris Associates), May, 2001.

"Tips for Managing Commercial Banking Litigation", The RMA Journal, The Risk Management Association, March, 2002.

"Real Estate Appraisal Review: Lessons from the Past", The RMA Journal, The Risk Management Association, June, 2003.

"Performing Aggregate Analysis", The RMA Journal, The Risk Management Association, October, 2003.

"The ABL Crunch Revisited", The RMA Journal, The Risk Management Association, July/August, 2004.

Compensation to be paid for the study and testimony

Plaintiffs (together with Portland Shellfish, Inc., a litigant in a similar case in Maine) have paid a retainer in the amount of \$1,500 to Mr. Clarke and are paying him at an hourly rate of \$240.

Listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years

Joseph R. Gamache vs. Kingfield Savings Bank and Gerard R. Belanger. Superior Court, Androscoggin/Cumberland Ctys., State of Maine. Deposition taken 7/19/00. Testimony given 8/3/01.

Gregory Y. Winston et al vs. Cape Code Bank and Trust Company, N.A. et al. Commonwealth of Massachusetts, Barnstable Superior Court. Testimony given 5/9/01.

Charles J. Labin et al vs. Wesley K. Bell et al. Deposition taken 6/12/01. Superior Court of New Jersey, Chancery Division, Atlantic County. Testimony given 7/10/01.

Leo Pelotte et al vs. Border Trust Company. Deposition taken 1/25/02.

Lawrence Savings Bank vs. Roofblok Limited, American Arbitration Association, Boston, Massachusetts. Testimony given 6/5/02.

Clyde V. Alexander, Jr., M.D. vs. Two Winthrop Properties, Inc., et al. Deposition taken 6/21/02.

Richard Anisfield et al vs Winthrop Financial Associates et al. Deposition taken 6/26/02.

Sheila M. Astuccio et al vs. R.K. Ahearn Co., Inc. et al. vs. Family Mutual Savings Bank. Commonwealth of Massachusetts, Lawrence Superior Court. Testimony given 10/23/02.


The Steamship Navigation Company et al. vs. Camden National Bank et al. Deposition taken 10/31/02. Oxford County Superior Court, Maine. Testimony given 9/16/04.

Buffum et al. vs. Chittenden Bank et al. Deposition taken 8/29/03.

Beal Bank, S.S.B. vs. Dollar Bank, Federal Savings Bank. Deposition taken 1/15/04.

Cadlerock, L.L.C. et al. vs. Transamerica Business Credit Corp. Deposition taken 6/3/04.

Fleet National Bank vs. L. Darrell Mayeux. Deposition taken 9/10/04.


Richard A. Clarke

Dated: November 23, 2005

No. of Pages: 80

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

R&P SEAFOOD/SHELLFISH,)	
INC. & FOUR SEAS, INC.,)	
)	
Plaintiffs,)	
)	Case No.
vs.)	05-CV-10420-MLW
)	
KENNEBUNK SAVINGS BANK,)	
)	
Defendant.)	
- - - - - X)	

DEPOSITION of RICHARD A. CLARKE, a witness called on behalf of the Defendant, pursuant to the Massachusetts Rules of Civil Procedure, before Allyson M. Danforth, RPR, a Stenographer and Notary Public in and for the Commonwealth of Massachusetts, at the offices of ANTICO, BARRETT, BURKE & KORNITSKY, One Essex Green, Peabody, Massachusetts, on Wednesday, April 12, 2006, commencing at the hour of 1:00 p.m.

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APPEARANCES:

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Appearing on behalf of Defendant

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Appearing on behalf of Plaintiffs

ALSO PRESENT:

Susan F. Hoctor, Esq.

Michael Scola

I N D E X

WITNESS: RICHARD A. CLARKE

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* Original Exhibits Retained by Atty. Bowie

S T I P U L A T I O N S

It is hereby stipulated and agreed by and between counsel for the respective parties that the deponent will read and sign the deposition transcript under the pains and penalties of perjury within (30) days of receipt of same or it is deemed to have been signed; that the notarization and filing are hereby waived.

It is further stipulated and agreed that all objections, except objections as to the form of the questions and all motions to strike, will be reserved until the time of trial.

Thereupon,

RICHARD A. CLARKE,
having been satisfactorily identified and duly sworn, was examined and testified upon his oath as follows:

(Exhibit Number 1 was marked for Identification.)

(Exhibit Number 2 was marked for Identification.)

(Exhibit Number 3 was marked for Identification.)

1 DIRECT EXAMINATION

2 BY MR. BOWIE:

3 Q. Would you state your full name, please?

4 A. Richard A. Clarke.

5 Q. Mr. Clarke, obviously you've been deposed
6 before, including by me, but I'm going to give you
7 a couple of quick comments about this afternoon's
8 exercise. First, if I ask you a question that you
9 do not understand, I would ask that you please tell
10 me that you don't understand the question. Do you
11 understand that direction?

12 A. I do understand.

13 Q. You also understand that if you answer a
14 question, I will assume that you have understood
15 it. Do you understand that?

16 A. Yes.

17 Q. If I ask you a question that you wish to
18 refer to your file to answer, please feel free to
19 do so. Do you understand that?

20 A. Yes.

21 Q. And you also understand that if you wish to
22 take a break at any time, I will accommodate that
23 request, however, if there's a pending question,
24 I'm going to ask that you answer the question

1 before we break, obviously subject to direction
2 from counsel. Do you understand that?

3 A. I understand.

4 Q. Okay. I'm going to show you what has been
5 marked as deposition exhibit number 1 and ask if
6 you've seen that before?

7 A. Yes.

8 Q. And do you recognize that to be actually
9 the notice of the original date that we set for
10 your deposition?

11 A. I'm not sure. There were so many false
12 starts there, but this is the -- I believe the
13 operative schedule A, if that's what you would like
14 me to say.

15 Q. Yes. Have you brought documents responsive
16 to the request for production in the notice of
17 deposition with you today?

18 A. Yes.

19 Q. And can I see them, please?

20 A. Okay. You want them in order?

21 Q. Yes, please.

22 A. Let's just take it as we have it here.

23 Let's see what this is. What I've done is I have
24 taken the deposition exhibits and I've date

1 sequenced the ones, which I felt were more
2 significant.

3 So that's what I have in this file. And
4 this is the residue. These are things that I did
5 consider, but obviously set aside.

6 Q. Okay. If I can take the stack that you
7 just said were most relevant. Can I take those,
8 please, and we'll mark those.

9 A. Okay. Just as a point of privilege, the
10 last time I did a deposition with you, you made my
11 file an exhibit, which was -- created great
12 difficulty for me, although we didn't go to trial.
13 Had we gone to trial, I would have had to operate
14 out of several files.

15 So if there's a document that I have that
16 you would like to make an exhibit, fine, but I
17 don't want to have a situation where I have my own
18 documents in a certain particular order that I then
19 can't deal with in the future.

20 Q. Mr. Clarke, we will mark that. If you want
21 to make a copy, I'll work with Mr. Kornitsky,
22 that's fine, but I think I'm entitled to mark it
23 and utilize it so that I know --

24 MR. KORNITSKY: Are you going to reference

1 things within the stack?

2 MR. BOWIE: I don't know even what's in it
3 yet.

4 MR. KORNITSKY: Can we first just take a
5 peak at it? Maybe we do some type of
6 compromise, as to how to mark it.

7 MR. BOWIE: I don't have a problem with his
8 retaining the original or we can make copies
9 or however, but --

10 MR. KORNITSKY: Right. We're going to let
11 you take the originals --

12 A. As long as once the deposition is over, if
13 we go to trial, I'm free to deal with my file in my
14 own fashion and to reorganize it or add or
15 supplement or what have you.

16 MR. KORNITSKY: I think he's just looking
17 to see what you brought. I think we have some
18 other stuff, too, that's been brought, but
19 it's separate.

20 MR. BOWIE: Mark that as exhibit 4, please.

21 (Exhibit Number 4 was marked for
22 Identification.)

23 Q. Starting with exhibit 4, which I understand
24 is the packet of material that you have indicated

1 are more significant documents, is that correct?

2 A. Yes.

3 Q. Okay. Can you tell me what the first page
4 is?

5 A. Yes. The first two pages are notes, which
6 I customarily take as I review documents in
7 depositions.

8 Q. If I can turn back to those first two
9 pages, there are both -- there's a summary that is
10 typed and then there are a variety of handwritten
11 notes on that. Can you tell, first of all, who
12 typed the summary?

13 A. I did.

14 Q. Okay. And the handwritten notes?

15 A. Those are my notes.

16 Q. Okay. And when did you prepare the
17 summary, if you know?

18 A. The summary was prepared in conjunction
19 with my original designation as an expert in the
20 disclosure. And what I -- as my practice -- as is
21 my practice because I was preparing last night and
22 today, as I went through the documents I just made
23 additional notations by hand.

24 Q. Okay. Can I see that, please?

1 A. (Hanging.)

2 Q. Mr. Clarke, there are a variety of
3 handwritten notations on a variety of the documents
4 contained in exhibit number 4. Are those your
5 notations?

6 A. Yes.

7 Q. What else have you produced here today?
8 You produced a folder which includes, you said,
9 documents that you have reviewed, but are less
10 significant than the items that are contained in
11 what I have marked as exhibit number 4, is that the
12 folder that I have in front of me?

13 A. Yes.

14 Q. What other documents are you producing here
15 today?

16 A. I was asked to bring the RMA -- which is an
17 acronym for Risk Management Associates, formerly
18 Robert Morris Associates -- materials in my file
19 pertaining to credit inquiries, which is this
20 folder.

21 Q. Are all of the materials that you have
22 handed me in the file that is marked RMA credit
23 materials from RMA?

24 A. Yes.

1 Q. There are a variety of items that have been
2 highlighted in the RMA materials. Were they
3 highlighted for this case or another case?

4 A. For both. I had those in my files and I've
5 used them in several other cases. So some of the
6 highlights pertain here, but some pertain to other
7 cases as well. They're a very useful set of
8 documents.

9 MR. BOWIE: If you can mark that as exhibit
10 number 5, please.

11 MR. KORNITSKY: The originals of that -- I
12 think he's going to want to retain the
13 originals. So he'll retain the originals on
14 some of these items?

15 MR. BOWIE: No.

16 MR. KORNITSKY: We will just make a copy.

17 (Exhibit Number 5 was marked for
18 Identification.)

19 Q. Mr. Clarke, I've marked as exhibit number 5
20 the folder of RMA materials, is that correct?

21 A. Yes.

22 Q. Okay. What else have you produced?

23 A. These are additional -- again -- items,
24 which were deposition exhibits in the present case,

1 which again I considered, but decided I didn't
2 need -- didn't need to really revisit those again,
3 at least appearing for my deposition.

4 I'm not discounting these things by the
5 way, it's just when I prepare for deposition, I try
6 to put the documents that tell the story in date
7 sequence. So those are additional documents that
8 are not in the date sequence. Then I have
9 deposition -- the depositions of Mr. Andrews and
10 Mr. Stevens.

11 Q. What other materials?

12 MR. KORNITSKY: We have some others here,
13 too.

14 A. These are just additional things in my file
15 that are probably more administrative in nature
16 pertaining to the case.

17 Q. Okay.

18 A. Your notice also -- in fact, I only noticed
19 this the other day in item number one refers to
20 cases -- plural -- against Kennebunk Savings. So
21 here's an old friend of yours.

22 Q. The file that you've just handed me is the
23 file that you have in the -- from the case of
24 Corekos (PHONETIC) versus Kennebunk Savings Bank,

1 is that correct?

2 A. That's correct. And although it was marked
3 as a prior deposition exhibit, it may or may not
4 contain all of the items that were in there and
5 probably has a few new things as well.

6 Q. All right. What other materials do you
7 have?

8 A. Just a blank file that had some stuff in
9 it. You asked for my billing schedule. You have
10 that in the disclosure. Items 2, 3 and 4 you have
11 already -- I think have already been provided.

12 Q. What's the folder that you have below your
13 arm currently?

14 A. Again these are just additional items that
15 I brought out of a sense of prudence.

16 Q. Can I see them, please?

17 MR. KORNITSKY: That's what he's paid to my
18 office, I believe.

19 A. I have bills. And the rest, I think, is
20 just pretty well a duplicate of what you've already
21 gotten. My publications. I do have a client
22 listing in here, in case you want to get into who
23 I've worked with up in Maine in the last 13 years.
24 You're certainly welcome to that. I think these

1 are all duplicate.

2 MR. BOWIE: Marc, I'm going to want a copy
3 of all of those.

4 MR. KORNITSKY: I can get somebody working
5 on it right now. Do you want me to do it now
6 or afterwards?

7 A. Excuse me, we're not done yet.

8 Q. Okay.

9 A. I also have notes from the depositions and
10 also just the notes from the RMA documents in the
11 file. That's what these things are.

12 Q. What is the other remaining notes in your
13 portfolio? Do they relate to this case?

14 A. It's just names of -- names of the players,
15 a little bit of a to-do list of things that I've
16 got to deal with here today, and a chronology of
17 events.

18 Q. I would like to have that as well.

19 A. Okay.

20 Q. And is there anything else?

21 A. Yes. My you know typed present summary of
22 time charges since the last bill was typed.

23 Q. I will want that as well.

24 A. (Handing.)

1 MR. KORNITSKY: Anything in your pockets?

2 Q. Do you have -- do you maintain computer
3 files with regards to this matter?

4 A. No. I believe that I've satisfied all of
5 the items requested in schedule A to the extent
6 that I have them.

7 Q. Do you have any other file materials that
8 you have accumulated in any way relating to your
9 review of this case?

10 A. No.

11 Q. Have you reviewed any other materials,
12 other than those that you've produced today, in
13 order to formulate your opinions with regard to
14 this case?

15 A. Yes.

16 Q. And can you identify what those are,
17 please?

18 A. I was provided this morning with an item
19 here. It's a credit report produced by Seafax,
20 which is a credit agency that many people in the
21 industry use for credit information and it's -- I'm
22 looking for a date on here to identify it better.

23 The last date I see here is 07/28/04. Here
24 it is 07/28/04.

1 Q. Okay. Have you reviewed any other
2 materials, in order to formulate your opinions with
3 regard to this case?

4 A. Yes. I --

5 MR. KORNITSKY: I don't know if you
6 reviewed this or not. This is something I
7 faxed you yesterday.

8 THE WITNESS: I didn't receive it. My fax
9 machine is only on when people call me to tell
10 me they're sending something. So whatever it
11 was, I didn't see it.

12 MR. BOWIE: Is that an item that you intend
13 to have him review, as we go on?

14 MR. KORNITSKY: I don't believe so. Now
15 that I've talked to him a little bit about it,
16 no, I don't.

17 A. I did add some items to this packet that
18 were not previously -- I mean -- in response to
19 your question, I'm not sure how you phrased it, but
20 there are documents in here, which I've reviewed
21 since I did my disclosure or approved the
22 disclosure provided by counsel.

23 MR. KORNITSKY: This document I don't think
24 was in there. This is one thing I showed you

1 this morning.

2 A. I'm sorry, I didn't see this. It's a file
3 memo from a Cindy Stewart dated June 15, 2004. I
4 also went on the Internet this morning. As you'll
5 see from my notes here, on the second page, there
6 were some open issues and I wanted to get the
7 specific federal reserve -- FDIC definitions of
8 OLEM substandards.

9 And believe it or not, I could not find a
10 clear iteration, so in my file I have a -- some
11 language and I don't even know where it came from,
12 but at least in my experience it appears to
13 represent the gist of what we're told by the
14 regulators, as far as these ratings categories and
15 it's attached to this file here.

16 I don't even know where I got that. But
17 based on my experience, it does appear to be
18 representative of what you would find in banks
19 making an attempt to explain to their officers what
20 these ratings are.

21 Q. So that I'm clear, Mr. Clarke, the items
22 that you just were referring to are the last two
23 pages of exhibit 4, is that correct?

24 A. Yes.

1 Q. And you can't identify for me where that
2 document comes from?

3 A. No, but I will say that the language
4 therein is the typical language that one sees being
5 produced by the various regulatory bodies, as far
6 as guidance for risk ratings.

7 Q. Which regulatory bodies are you referring
8 to?

9 A. Here I'm not sure, but since -- for the
10 past few years -- and certainly during the time
11 period of this report -- all of their material in
12 effect is common to all of the agencies, so I would
13 say those ratings are common to both the OCC and
14 the FDIC, as well as state regulators.

15 Q. Do you know whether these documents are
16 consistent with either regulations or internal
17 documents with the Maine Bureau of Business
18 Regulation, as it relates to banking and financial
19 institutions?

20 A. I do not.

21 Q. Do you know when the last two pages of
22 exhibit number 4 were prepared?

23 A. No. I would -- certainly, if this becomes
24 an issue before trial, I will get the latest and

1 official iteration or iterations, but I was
2 satisfied that that's representative of the
3 language that's in play in banks of --

4 Q. Mr. Clarke --

5 A. May I finish, please? -- in banks in New
6 England of the same size as -- as Kennebunk
7 Savings.

8 Q. Mr. Clarke, the purpose of taking your
9 deposition today, sir, is to prepare for trial and
10 have the information that you intend to rely on at
11 trial. If you intend to get further information, I
12 would like you to identify what further information
13 you intend to get prior to trial.

14 A. Sure.

15 Q. Do you intend currently to get additional
16 information with regard to definitions of terms to
17 describe a bank's relationship with a customer?

18 A. Certainly that's a broad question. I think
19 more -- I think if I can phrase it, I think I can
20 phrase it better for you. That which you just
21 asked is so general that I really can't answer it.

22 I do intend to get a document that exhibits
23 the guidance that bank's receive from their
24 regulators regarding these rating categories. I'm

1 satisfied that what I have is -- is representative,
2 however, I don't have a date and a source.

3 MR. BOWIE: That's going to be done,
4 Marc -- so the record's clear, I think I'm
5 entitled to that. I think I'm entitled to it,
6 frankly, as of today, but I understand that it
7 is not here so -- but the record is clear, if
8 there is a supplementation, as we go along
9 towards trial, I'm certainly going to ask that
10 you make it prompt, because I will object at
11 this late time.

12 MR. KORNITSKY: I understand.

13 A. In fact, what I really need to do at this
14 point in time is to offer a correction to the
15 disclosure that you received from Mr. Kornitsky. I
16 will answer your question, but I think before I
17 answer, I've got to do that first.

18 Q. I have marked the disclosure and the --
19 your report as exhibits 2 and 3. So in order to
20 put that in context, exhibit number 2 is the
21 pleading, which is Mr. Kornitsky's disclosure.
22 Have you seen that before?

23 A. I believe I have.

24 Q. Okay.

1 A. Yes.

2 Q. And exhibit number 3 is a report, as I
3 understand it, which summarizes your testimony, is
4 that correct?

5 A. Yes.

6 Q. Okay. And you've indicated that you want
7 to make a correction to that disclosure. Can you
8 tell what that correction is, please?

9 A. Yes. On page 2 --

10 Q. And this is in exhibit 3?

11 A. Exhibit 3. It says, "Any and all documents
12 produced by the defendant during discovery."

13 MR. KORNITSKY: At number 3.

14 A. Right. I do not believe I have done that.
15 I don't know -- there are many documents that I
16 would still like to see. I understand production
17 is ongoing, but I'm sure that there were documents
18 produced that I have not seen. And so that's not a
19 correct statement and it's an error on my part for
20 which I apologize.

21 MR. BOWIE: Again if there's going to be
22 more information provided to this witness for
23 his testimony at trial, I would object to not
24 having provided it today. This is my

1 opportunity to depose the witness to find out
2 what he's got to say.

3 MR. KORNITSKY: Well, what he is saying is,
4 what he's given you is what he's relied on.
5 The disclosure said that he reviewed
6 everything that had been provided by defense
7 counsel. That was in error. I didn't provide
8 him with the deposition of Vinny Clough, I did
9 not provide him with the deposition from my
10 clients.

11 Things that are related to the bank, I have
12 provided him with. Additionally, I don't have
13 any information back yet from Seafax. And I
14 only gave him a couple of things from the SBA
15 from CEI. But what I have provided to
16 Mr. Clarke, you have. If I give him anything
17 else, I will give it to you.

18 MR. BOWIE: That's the part that I was
19 trying to establish.

20 A. Excuse me, I believe there's a pending
21 question that I interrupted. And you asked me what
22 other items would I intend to seek or look at.

23 Q. Yep.

24 A. If you go to page 2, right on the top of --

1 I see you don't have a copy -- of my notes, when I
2 prepared this disclosure, I did not have available
3 to me any interim figures for a good part of the
4 year 2004.

5 And I understand that the figures were
6 provided to the bank and I would very much like to
7 see the latest financial statement provided to the
8 bank prior to the date that these -- these letters
9 were issued on October 8.

10 And I think it reflects in my notes it was
11 an open item at the time of the disclosure and I'm
12 still awaiting those figures.

13 MR. BOWIE: Marc, what might be easier, if
14 we could makes copies of the first two pages
15 of exhibit 4 -- the summary that he's reading
16 from.

17 MR. KORNITSKY: If you want to start with
18 that, I can make copies right now.

19 MR. BOWIE: If you could make copies and
20 start with that.

21 (Discussion off the record.)

22 Q. Mr. Clarke, do you have in front of you the
23 first two pages of exhibit 4?

24 A. Yes.

1 Q. Okay. On the second page you have
2 indicated that there were a variety of open
3 issues -- I think is the word you characterized
4 them?

5 A. Yes.

6 Q. And you've indicated that at least some --
7 or at least on one occasion you were looking for
8 some additional or financial statements or updated
9 numbers. Where are you -- to what part of the page
10 are you referring to?

11 A. Well, down at the bottom it says, "To do
12 slash questions."

13 Q. Yes.

14 A. On the second item it says, "What did
15 06/30/04 interim show." That's my cryptic language
16 for saying what were the latest figures in hand by
17 the bank at the time these letters were issued.
18 There is a list of other obviously open items there
19 as well.

20 Q. My first question is for you with regard to
21 the first two pages of exhibit 4 -- I'm sorry, let
22 me back up. Are there other items that you were
23 specific -- that you currently intend to get
24 further information about?

1 A. Not -- no, other than what's listed here.
2 And some of these, I think, have been satisfied.

3 Q. If we could turn to the first page of
4 exhibit 4 then. I apologize for doing this and I'm
5 not going to ask you each and every time I can't
6 read your writing what it says, but for the first
7 two pages, I think it would be helpful for me to
8 know.

9 So if we can start at the top, could you
10 just read for the record what that first notation
11 is?

12 A. Certainly. Although may I characterize it
13 first?

14 Q. Yeah, that would be helpful.

15 A. I was just trying to summarize what the
16 total exposure was -- and I'll refer to the bank as
17 KSB, if I may -- during the time period of this
18 situation as it developed.

19 Q. So starting with that, can you tell me what
20 the notation of the top of the first page of
21 exhibit 4 says and secondly what it means?

22 A. Well, it says, "Owed \$1,161,000 total," and
23 then I have the components, but just in general
24 terms because these seem to be maximum amounts and

1 I didn't go to the trouble of getting down to
2 dollars and cents.

3 And then to the right of that I have, "A
4 total of \$1.4 million." And that's based on a
5 credit presentation dated October 12, '04.

6 Q. Below the term that says, "Owes \$1.16
7 million," is that a correct total?

8 A. Right.

9 Q. And there is an arrow and a comment, can
10 you tell me what that says?

11 A. It says, "Actually higher. See page 7 of
12 April 27, '04 presentation." It says, "Pres," but
13 that's an abbreviation.

14 Q. And to the right of the bracket at the top
15 of the page there are a series of numbers and then
16 a writing beyond that. Can you tell me what those
17 are, please?

18 A. All right. It says, "750,000 R slash E,"
19 which stands for the real estate loan to Preble
20 Properties. "\$500,000 A slash R line," standing
21 for accounts receivable. "100,000 L slash C line,"
22 for letters of credit in an approximate amount of
23 150,000 in second mortgages.

24 Q. Okay. To the right of the very first line

1 where it says "\$750,000 real estate," can you tell
2 me what that notation is?

3 A. Yes. It says, "Preble Properties, LLC."

4 Q. Moving down to, "Bank concerned with Preble
5 risk," can you tell me what the writing to the
6 right of that is?

7 A. Again I have abbreviations here, so I'll
8 give you the full -- the unabbreviated text, "Use
9 exhibit 14 quotes dash prepared in 2003."

10 Q. And exhibit 14's deposition, is deposition
11 exhibit 14?

12 A. It's either Andrews or the president, one
13 of the two. And I can tell you in a second, if you
14 would like me to.

15 Q. I think we tried to maintain one set of
16 numbers in this case. I won't promise that we were
17 good at it, but I can tell you that I thought we
18 tried to do that.

19 A. Well, if you did -- anyway, it is exhibit
20 14 in one of the two depositions.

21 Q. All right. The next additional line is to
22 the right of, "Major losses 2002, 2003," what does
23 that say?

24 A. The losses -- it says, "Significant per

1 exhibit 13 dated 04/26/04."

2 Q. Then as we drop down to the left of
3 "insolvent" is the term, "big time," is that
4 correct?

5 A. You betcha.

6 Q. And to the right of that line is,
7 "04/27/04" something?

8 A. "Presentation." It says, "P-R-E-S," but
9 that's my abbreviation for presentation.

10 Q. Then to the right of, "Unable to service
11 debt," is a notation. Can you tell me what that
12 says?

13 A. It says, "Late KSB payments, exhibit 19,"
14 which is dated 11/26/04. And then, "comma exhibit
15 14 regarding negative debt service coverage."
16 Again I have abbreviations here I'm sounding out,
17 but that's what it means.

18 Q. Below that you have, "Weak G-T-O-R," and a
19 typed portion. First of all, what is G-T-O-R?

20 A. Guarantors.

21 Q. And to the right of that is a date and some
22 handwriting. Can you tell me what that says?

23 A. "04/27/04 pres," for presentation.

24 Q. And then to the right of that is an

1 additional line. Can you tell me what that says,
2 please?

3 A. "Undersecured. Exhibit 2 dated," I believe
4 it's, "10/27/03." I have trouble with my own
5 writing, too. And then a, "hyphen for separate
6 borrower," with a, "question mark."

7 Q. As we go to the left of the page, there is
8 a comment and I can't read what that says either.
9 Can you tell me what the comment just below, "big
10 time" is?

11 A. Yes, "Inability to meet forecasts," and the
12 reference is "04/27/04 presentation."

13 Q. And below that we have a line running
14 toward the typed -- September 30, '04 financial.
15 What does that comment say?

16 A. It says, "Should have reviewed before
17 sending letter."

18 Q. And below that is, "Hiring outside
19 consultant red flag," there is a handwritten
20 notation after that. Can you tell me what that is,
21 please?

22 A. "Exhibit 10." And this also just reminds
23 me that there's a quote in there, "Extensive
24 discussion."

1 Q. To the right of that in the margin, if you
2 will, of the first page is some handwriting. Can
3 you tell me what that comment or comments are?

4 A. Yes. "Internal dispute, exhibit 8 dated
5 June 28, '04."

6 Q. Does the next comment immediately below it
7 go with that comment?

8 A. No, it's just a separate negative.

9 Q. And what does that next comment say?

10 A. "A slash P squeeze," standing for accounts
11 payable. "October 6, '04 letter."

12 Q. And then below the typed comment, "Request
13 for multiple trade letters a sure tip-off of severe
14 problems." What does that say?

15 A. It says, "Cash flow less than policy, page
16 9 of April 27, '04 presentation."

17 Q. Immediately below that is an additional
18 line. Does that go with that same comment?

19 A. Right, it's another reference. And I'm
20 having trouble with the date, but there is an
21 additional document -- and I can't tell whether
22 it's, "October or December 2nd, '04 document also."

23 Q. In the margin to the left of the section
24 that is entitled, "Term quote satisfactory end

1 quote, usage and letter," is a handwritten comment.

2 Can you tell me what that says, please?

3 A. Yes. "10/12/04 presentation for emergency
4 financing."

5 Q. Okay. And then at the very bottom of that
6 section is a comment. Can you read that for me,
7 please?

8 A. It says, "If no improvement shown,
9 downgrade to substandard, (04/27/04 presentation),
10 page 9."

11 Q. And is the handwriting below that part of
12 the same comment?

13 A. Yes.

14 Q. What does that say?

15 A. "Failed to downgrade per 10/12/04
16 presentation."

17 Q. All right. If we could turn to page 2,
18 please. First line, "Also pending possible events
19 not disclosed." There is a line after that and
20 then a comment. Can you read what that says,
21 please?

22 A. Yes. It says, "Refs" meaning references,
23 "pending re-fi, dependent on SBA subordination."

24 Q. And then below that there is typed, "Bank's

1 respond to specific vendor requests prin," and then
2 something written.

3 A. Well, I corrected it. The typed version
4 was, "Principal 4," and I corrected it to,
5 "Principal 3."

6 Q. And then to the right of that is some
7 handwriting. Can you tell me what that says,
8 please?

9 A. Yes. "All materials start with request
10 from inquirer, also KSB policy."

11 Q. At the -- in the paragraph of your notes on
12 page 2 it starts, "Erroneous responses." In the
13 second line there appears to be either a correction
14 or a note or both. Can you tell me what that is,
15 please?

16 A. Yes. It appears that -- well, there's a
17 typo. And the intent here was to show a date,
18 "10/08/04," so that's what that correction is.

19 Q. And the writing immediately above it?

20 A. That relates to the first line. And it
21 says, "Code article one."

22 Q. And when you say "code," what code are you
23 referring to?

24 A. One of the RMA documents.

1 Q. And then, as we go down below the --
2 "believed Preble had to ask him to do it," is two
3 lines. Can you tell me what those say, please?

4 A. "See two-way street publication," which
5 again is in the RMA documents. And secondly it
6 says, "Not required per KSB policy."

7 Q. And the last handwritten note, "Everyone
8 will be glad to know," appears to be at the lower
9 right-hand margin. Can you tell me what that says,
10 please?

11 A. "Need to compare Preble to other KSB policy
12 requirements," and then in parens, "not produced,"
13 with a "question mark."

14 Q. Okay. What does that comment mean?

15 A. One of the things that I would like to
16 do -- and normally in cases of this sort, one of
17 the documents that's available is the loan
18 policies. And the obvious issue here is whether
19 this loan to Preble was satisfactory or not. And
20 one of the ways to determine that is to compare it
21 to the bank's policies.

22 And that's an added step, which should be
23 done here, although I was comfortable giving the
24 opinions that I did with what I had in hand.

1 Q. If you would turn to exhibit 3, please,
2 exhibit 3 is labeled, "Plaintiff's Expert Witness
3 Report," and it is on page 6 signed by you, as of
4 November 23, 2005, is that correct?

5 A. Yes.

6 Q. Okay. First, did you prepare that
7 document?

8 A. No, I believe it was prepared by counsel
9 with my editing.

10 Q. Do you know what the edits were?

11 A. Not offhand, no. Not that I can recall,
12 but obviously I missed one and that was the
13 correction that we made earlier.

14 Q. Is there anyway to tell what edits you
15 made? In other words, is there any draft or other
16 document that you have that would allow us to
17 figure out what, if any, edits you made?

18 A. Not in my possession. Obviously from page
19 3 onward it's just an iteration of all the
20 materials that I myself have prepared. But in the
21 first two pages, this was provided by counsel. And
22 this was the second disclosure, I might add.

23 Earlier I did a Maine disclosure. And the
24 edits for my Maine disclosure I actually can show

1 you what they are and this, more or less, tracks
2 it, but it's not exactly the same. In other words,
3 the Maine disclosure was done first, it was edited,
4 then this was picked up by attorney Kornitsky.

5 Q. Is the summary of your opinions and the
6 basis for those opinions, as set forth on pages 1
7 and 2 of exhibit 3, accurate as of today?

8 A. Yes.

9 Q. Are there any other specific opinions,
10 facts or conclusions -- I understand that there may
11 be some subsidiary facts or conclusions beyond this
12 summary, but are there any other specific facts,
13 opinions or conclusions that you intend to offer
14 that are not summarized on pages one and two?

15 A. I would offer the outline, which I
16 prepared, as being a more complete document. I
17 think it fits within the disclosure parameters, but
18 it's much more complete and a much better guide to
19 the kind of references I'm looking at and the kinds
20 of things I might say at trial.

21 Q. Okay. That's fair. I have a few questions
22 with regard to some of the background information,
23 if you will, that's been appended to exhibit number
24 3. I'm just going to ask you a variety of

1 questions.

2 First of all, can you identify any specific
3 cases in which you have addressed a bank's
4 obligation to person's, other than the bank's
5 customer?

6 A. I'll have to look at my list.

7 Q. Yes.

8 A. The answer is, yes, but to be specific,
9 I'll have to look at my client list.

10 Q. That's fine.

11 A. That's why I brought it. I may miss a few,
12 but I'll do my best.

13 Q. Yes.

14 A. Excuse me, could you repeat the question
15 again?

16 (The question was read.)

17 A. Could you define "cases," please? I just
18 want to give you a proper answer.

19 Q. I'm asking for any matter in which you've
20 been involved, whether you've been asked to simply
21 review those issues, whether you've testified by
22 deposition, or whether you've testified at trial.

23 A. I have advised dozens of banks. And in
24 doing that, obviously there are obligations to

1 numerous other parties. So the answer is, I've
2 done it a lot. I'll give you a few specifics, if
3 you'd like.

4 But it happens as a consultant. It
5 certainly happens in some of the depositions I've
6 given. It certainly happens at trial. And I'll
7 certainly try to pick out a few here that --
8 obviously whenever I do a seminar, it gets into a
9 whole bunch of issues.

10 I'm going to skip the consulting ones
11 because it happens in literally every single bank
12 that I've consulted for. Here's one Beal Bank.
13 This involved a bank in Pennsylvania -- a dollar
14 bank at Beal Bank. And again I'm not sure whether
15 there's a confidentiality order or not, but I think
16 I can safely tell you that it was the duties of an
17 agent bank to a participant.

18 We're going to be a while, so you will see.

19 Q. Okay, that's fine. I'm out of water. We
20 can take a short break.

21 A. I'm going to have to mark this up and make
22 notes because there's going to be a lot of them.

23 Q. That's fine.

24 A. Let me just ask a question before we break.

1 Q. Sure.

2 A. When you say "bank," are you interested in
3 other financial sources or just bank financing?

4 Q. For the moment, let's limit it to banks.

5 A. Okay, thank you.

6 Q. Sure.

7 (A recess was taken.)

8 Q. Mr. Clarke, we broke for you to have an
9 opportunity to review a part of your client list,
10 in order to identify cases in which you had been
11 asked to address the issue of a bank's obligation
12 to someone other than their customer.

13 And I understand that you've had a chance
14 to briefly examine at least the first four pages of
15 your client list and you've identified at least
16 some of the cases in which that was an issue. Can
17 you walk through those with me, please?

18 A. Yes. Before I get into specifics, let me
19 just say that with many of the law firms here, I've
20 done three and four case and they all run together
21 like alphabet soup. So for every example I give
22 you, I'm sure on each page there's probably one or
23 two others that I just haven't been able to recall
24 in the short time available here.

1 But going to the -- right now I'm involved
2 in a case called Clinton Savings Bank and it
3 involves a kiting situation. And the issue there,
4 I believe, is the responsibility that a bank has,
5 as a participant in a kiting situation, to other
6 parties injured in the kite.

7 Q. In that case do you represent Clinton
8 Savings Bank or do you represent the people making
9 a claim against Clinton Savings Bank?

10 A. Clinton Savings Bank. Coopers & Lilburn,
11 who are now Price, Waterhouse, Coopers. I've done
12 at least seven matters for them, very few of which
13 have either gotten to deposition or trial, but the
14 issue is the duties that flow between an accounting
15 firm and banks relying on the accounting firm's
16 audit, and the conduct of the banks in relying on
17 audited figures.

18 There's another case here, it's called the
19 D'Esopo case. D-'-E-S-O-P-O. This is a claim
20 against Shawmut Bank by an injured third party.
21 And I can't really remember the specifics, but she
22 was not a customer -- a direct customer of the
23 bank.

24 Q. Do you know whether that involved a credit

1 report?

2 A. Excuse me, I'll take it back. Her father
3 took trust funds in the possession of the Shawmut
4 Bank, so technically she is a bank customer. I've
5 done work in the case involving the directors of
6 Capital Bank. And obviously that gets to the
7 duties of a director of a bank and the duties
8 between the bank and the board of directors.

9 I've done a number of cases, either for
10 banks or title companies, where they were
11 litigating over the bank's ability to collect from
12 the title company. And again it gets into the
13 duties amongst the parties. I did a case for the
14 Office of Thrift Supervision.

15 I've also done cases for FDIC, again where
16 the gist is the duty of the bank to its regulators
17 and vice versa. I did a case for an attorney here
18 locally named Morris Gordon, which was fascinating.
19 It related to his serving a writ of attachment on a
20 bank's branch on a Saturday, again for an attaching
21 creditor.

22 I did a case in Rhode Island for an
23 attorney called Gyorgy, G-Y-O-R-G-Y, which related
24 to the duties of a bank to the former owners of a

1 business. In other words, they were former
2 customers, not current customers.

3 I did a case for Remer & Bronstein
4 regarding the reliance of banks on legal opinions
5 at closings. In fact, that was the famous Whistler
6 case, also known as the manufacturer of the
7 Fuzzbuster.

8 I did a case for Hogan & Hartson quite a
9 while ago relating to credit inquiries, similar to
10 what we have here.

11 Q. Where was that case?

12 A. It was tried in Pennsylvania. The judge's
13 name was Malcolm Muir. I remember him because he
14 was in his 80's and liked to pick on attorneys
15 appearing before him. It was one of the central
16 districts of Pennsylvania. I believe it was in
17 Harrisburg area.

18 I'm sorry, no, he was in the Williamsport
19 area, one of the several seats I think where he
20 held sway. This is a Spanish bank relying on
21 credit information provided by a U.S. bank. There
22 have been a number of those cases, by the way, too,
23 I'm just not recalling. That's one that I do
24 recall.

1 There have been a number of cases involving
2 check fraud, so it really basically has to do --
3 between -- the relationship between the bank and
4 the party defrauded, who normally was not a bank
5 customer. I did a case involving field
6 examinations. I've done several of those, which
7 really involves the interplay of duties between
8 field examiners, auditors and lenders.

9 I've done cases involving the duties of
10 third-party bank services to various parties -- not
11 bank customers -- to rating agencies and to a whole
12 bunch of other third parties. Again that's the
13 first four pages. And again I'm sure just even
14 there, there's probably dozens of cases I've been
15 involved in.

16 If I went and sat with my files and spent
17 two days, I could come up with it, but I've done
18 quite a bit I believe.

19 Q. You've indicated the case in the central
20 district of Pennsylvania involving a claim by a
21 Spanish bank against another bank arising out of
22 credit inquiries. Can you think of any specific
23 cases in which you had been involved where the
24 issue had been the bank's responsibility to vendors

1 of the bank customer, who relied upon bank
2 information in making a decision to extend credit
3 or terms to the customer of the bank?

4 A. I'm sure there have been. So far they
5 haven't popped up in my review, but I know even
6 within the first four pages there's got to be three
7 or four of those, but they just didn't leap out at
8 me, as I went through it.

9 Q. Are you currently a member of RMA?

10 A. No, but they're a client.

11 Q. Okay. When you say, "they're a client," in
12 what way?

13 A. Over the past decade I have put on several
14 seminars in various areas of the country for RMA.
15 I've spoken at their national convention. They
16 continue to publish my materials and I continue to
17 receive royalties on at least one publication. So
18 there's an ongoing relationship with RMA.

19 Q. When did you last do a seminar for RMA?

20 A. Three or four years ago.

21 Q. And before that when was the last time you
22 did a seminar for RMA?

23 A. Some of them are spelled out in my
24 disclosure. I believe there's probably a couple of

1 others, but that's it.

2 Q. Other than your receipt of royalties from
3 RMA for articles or other materials that you have
4 authored, have you had any other connection to RMA
5 since the seminar that you did three or four years
6 ago?

7 A. Yes.

8 Q. And what was that?

9 A. We speak to each other fairly frequently on
10 a variety of topics. I know that I've arranged for
11 access to the RMA libraries for several clients
12 who -- especially law firms, who are doing
13 litigation where RMA publications would be helpful.

14 I believe within the last two years I've
15 published at least one article with them. There is
16 interaction there, but that's the gist of it.

17 Q. Were you ever an officer or holder of a
18 particular position with RMA?

19 A. No. I was a member, when I was in the
20 banking community. But it's not customary for
21 people who are not working for institutions,
22 whether they're banks or finance companies, to
23 continue their membership.

24 Q. Do you know Mr. Lund?

1 A. Probably do. And I'll give you even odds
2 he's attended at least one of my seminars, but I do
3 not know him.

4 Q. Do you hold -- do you know what the Credit
5 Risk Certified designation is?

6 A. I'm -- not exactly. Possibly something to
7 do with the SBA, but I'm not sure.

8 Q. Is it fair to say you do not hold that
9 designation?

10 A. That's correct.

11 Q. Mr. Clarke, I'm going to take you up on
12 your suggestion that we discuss the facts and
13 opinions to which you may testify by using the
14 summary that appears as the first two pages of
15 exhibit number 4, rather than working off of
16 exhibit number 3.

17 So if you could turn to that, please. At
18 the top of the first page under "background," it
19 says, "Clarke advisor to Eastcoast Seafoods." Can
20 you tell me what role you played with Eastcoast
21 Seafoods?

22 A. Yes. I was an advisor to Eastcoast for
23 about four or five years in the late '90s.

24 Q. And what -- can you tell me a little bit

1 about Eastcoast Seafoods?

2 A. Eastcoast Seafoods is the largest
3 wholesaler of North American lobster in the country
4 and a major provider of lobster to Europe and other
5 areas as well.

6 Q. And in what areas were you advising
7 Eastcoast Seafood?

8 A. I, in effect, acted as a contract CFO for
9 the company.

10 Q. While I think of it, can you tell me
11 approximately how much of your professional time
12 currently is spent with litigation management?

13 A. It depends on the year. I would say last
14 year, probably less than 10 percent.

15 Q. The year before that?

16 A. Probably higher, 30 percent.

17 Q. How about for this year so far?

18 A. Almost nil until the last month. I've been
19 very busy the last month.

20 Q. Turning back to exhibit 4 below the line
21 for, "Clarke advisor to Clarke" -- "to Eastcoast
22 Seafoods," is the indication, "significant other
23 industry experience." What were you thinking of
24 when you made that notation?

1 A. Well, first of all, I, as a lending
2 officer, as a worker officer or as a senior credit
3 officer, was probably involved with well over a
4 dozen companies that were either wholesalers or
5 retailers, such as James Hook, Viking Seafoods.

6 I humorously introduced the Ed Dunkin name
7 here earlier, but I can remember -- I almost want
8 to say Share Mark Fisheries, which would probably
9 be correct. Some of the names that come to mind,
10 Bank of Boston was a major lender to the seafood
11 industry, and so I was involved there.

12 And subsequently I've continued to talk to
13 the principals of Viking. Not on a client basis,
14 but as friends, as well as the Eastcoast people.
15 And I'm sure there are others that I haven't
16 thought of right now, but those are some
17 representative names.

18 Q. Okay, the -- can you explain to me what the
19 organization -- the first two pages of exhibit
20 number 4 is? In other words, you appear to have
21 identified two significant areas that you're going
22 to testify about and then there's additional other
23 issues section where there are a variety of items.

24 I'm going to ask you -- ask if you would

1 just explain to me what you're intending to do by
2 organizing it in the way you did?

3 A. Well, the first section after the
4 background is -- simply is my attempt to solidify
5 whether the bank was really concerned about Preble,
6 whether it really was a satisfactory relationship
7 just prior to issuing these letters.

8 And I believe that it was not satisfactory
9 and I have a bunch of references here, both in the
10 documents and in the RMA Publications -- I'm sorry,
11 that follows. But these are the references really
12 in the documents to show that I don't believe that
13 anybody who knows anything about banking could call
14 this a satisfactory relationship at any point in
15 2004.

16 Q. Okay. The RMA guidelines provide for a
17 series of ways in which a bank may -- may summarize
18 its relationship with its customer, correct?

19 A. Yes.

20 Q. And there are -- satisfactory is one of the
21 ways that the bank may summarize the relationship,
22 correct?

23 A. Yes.

24 Q. Can you tell me what the others are?

1 A. Generally satisfactory and unsatisfactory.
2 It's kind of like excels, pass, fail.

3 Q. And in this case, what is your position as
4 to what the bank should have said, in terms of
5 characterizing the relationship with Preble?

6 A. There's a variety of ways that this would
7 be handled. The bulk of my career was spent doing
8 workouts and handling inquiries of troubled
9 companies and this clearly was a troubled company.
10 And the bank either should have refused to answer
11 or if they did, they really should not have
12 characterized it as satisfactory.

13 I think that -- again I haven't really
14 given this a lot of thought, as to what they should
15 have done, but I would have stuck to the facts and
16 I would not have given an opinion and they did.
17 And I certainly would never have cited a future
18 fact.

19 I would not have volunteered the
20 information without a specific inquiry and without
21 a specific amount. I mean there are other things
22 that happened there and I've got them listed
23 throughout my notes, but I had no problem rendering
24 the opinions that I did.

1 First of all, this is not a satisfactory
2 credit, especially that the bank should not have
3 acted in the fashion that they did. There --
4 there's no right answer to what they should have
5 done. I can give you some scenarios, if you want
6 to take the time.

7 Q. Sure.

8 A. One is not to answer. Another one is to
9 simply say it's a long-standing customer or
10 whatever the timeframe -- I don't recall exactly
11 when this started -- and that they are experiencing
12 difficulties, but the bank continues to work with
13 them. Okay. That probably would be the gist of
14 the answer or one alternative answer.

15 Another one would simply be to talk about
16 the length of the relationship, the balances, the
17 loan amounts and not give a recommendation. And
18 certainly no recommendation was warranted here
19 under these circumstances.

20 Q. Okay. When you say "recommendation," what
21 do you mean by a recommendation?

22 A. In effect, as to whether the bank considers
23 them to be satisfactory. In effect, although
24 they're not saying we ask you to ship, in effect

1 that's what that letter did. That was a
2 recommendation. That was saying, "Guys, it's okay.
3 These guys are restructuring the credit and
4 everything's hunky-dory," and it wasn't hunky-dory
5 and the company really was in trouble.

6 And for openers, if you look at the balance
7 sheet, I'm going to be very interested to see if
8 Mr. Lund can say that a company that's book
9 insolvent by several hundred thousand dollars
10 before intangibles is a satisfactory relationship,
11 especially with the comments and the documents
12 about the importance of leverage.

13 I will be fascinated to find out why they
14 didn't downgrade it to five, when it didn't improve
15 after the credit presentation in the spring of '04.
16 I mean there's all kinds of stuff here that, again,
17 I'd be more than happy to discuss with you and I'm
18 sure we'll be discussing at trial.

19 Q. Are the items that you have just raised --
20 is it fair to say some of those are summarized
21 under the heading, "Bank concerns with Preble
22 risk"?

23 A. Yes.

24 Q. First is, "On a watch list slash OLEM since

1 04/26/04," correct?

2 A. And that's incorrect. It actually goes
3 back to '04. As I was preparing I saw additional
4 references.

5 Q. What's the significance of that statement?

6 A. The rating OLEM is not a satisfactory
7 rating. And if you look at some of the materials
8 that I have here, as far as what OLEM means, I'm
9 sure that someone may argue that it is not a
10 criticized asset, it's the step before criticized,
11 so it is an unsatisfactory or marginal asset of the
12 bank and it's what we call honorable mention.

13 And it is a bank the loan would rather not
14 have and cannot be deemed as satisfactory. So
15 could someone have said, "generally satisfactory"?
16 Possibly for some OLEM loans. But what you have
17 here is a loan that was categorized as OLEM, and by
18 the bank's own definition should have been worse,
19 at least before the letters were issued.

20 Q. Below the "on watch list," there are a
21 whole series of notations that you have been --
22 that you have made that are indented, including,
23 "Major losses 2002, 2003. Unable to service debt,
24 insolvent with B slash -- deteriorating during

1 2004."

2 Are all of those items that you believe are
3 supportive of what you just stated that you believe
4 that the account should have been downgraded after
5 April of 2004?

6 A. Yes. And, in fact, the bank's own
7 statement in April says, "If it doesn't get better,
8 then we should downgrade it further." And I saw no
9 evidence that it got better, I saw evidence that it
10 got worse.

11 Q. In what sense do you believe -- what facts
12 are you relying on to say it got worse?

13 A. It basically -- first of all, the debt
14 service coverage ratio continued to erode, if you
15 look at the different credit iterations, and the
16 losses continued. I mean among other things. I
17 mean there were all kinds of evidence.

18 Now the one thing I would like to see --
19 and I'll repeat this -- is interim statements in
20 the summer. A key issue here is when the bank
21 received the September 30 statement, but I submit,
22 because they were on what we call full following,
23 that they had ample warning that things were not
24 going to be groovy when the September 30 figures

1 arrived.

2 And I can't tell whether they had those
3 September 30 figures before or after they issued
4 the October 8 letter, but they should never have
5 issued that letter under those circumstance, among
6 other reasons, without getting current financials
7 from the borrow.

8 I think, given all the issues here and the
9 fact that four days later they had to go for
10 emergency financing -- in effect, which is what I
11 would characterize it -- to keep this borrower
12 afloat -- I mean lots of other logs for this fire.
13 I'm just giving you some representative examples.

14 Q. What emergency financing are you referring
15 to?

16 A. Basically this company had a crisis with
17 their trade payables, as referenced in the October
18 6 request from the company to send out these
19 so-called 16 letters. And then on October 12 the
20 company provided additional financing -- several
21 hundred thousand dollars to deal with -- again --
22 critical trade payables.

23 That to me, for a bank with an OLEM loan to
24 do that is indicative of emergency financing.

1 Q. What additional financing, are you saying
2 the bank provided in October?

3 A. I believe they rewrote the real estate loan
4 and a small amount of the proceeds went to Preble.
5 And I believe there's one other facility, which may
6 also have squeezed out some financing.

7 I think you'll find, when you look at the
8 October 12 presentation, that a couple of hundred
9 thousand dollars was created in liquidity that went
10 to the trade four days after the letter saying it
11 was satisfactory.

12 Q. We have, "hiring an outside consultant a
13 regular flag." What's that reference to?

14 A. Basically most companies, unless they're
15 desperate, will not bring in outside help. And, in
16 fact, I have an RMA article -- a publication in the
17 list of use of outsiders, which you might find
18 interesting.

19 Q. What are you referring to there?

20 A. I believe that they did bring in somebody
21 -- into the company to help them with their
22 problems. And I can't remember whether that was
23 the guy that ultimately became the -- became the
24 new investor or the new principal.

1 Q. Do you know when that occurred?

2 A. Let's go to look at exhibit 10. I need the
3 date on exhibit 10 to find it easily, if somebody
4 has it.

5 MR. KORNITSKY: Exhibit 10 to what?

6 THE WITNESS: You're not going to get it
7 there. I just have it as exhibit 10.

8 A. I don't -- again without a date, I'm not
9 going to be able to find it in my stuff.

10 Q. That's fine.

11 A. It talks about bringing in someone to help
12 the company. It also talks about the fact -- and I
13 believe the fact it was -- I want to guess, it was
14 probably the summer of '04. And it talks about the
15 fact that the credit committee or the loan approval
16 committee had an extensive discussion about this
17 credit. You do not have extensive discussions
18 about satisfactory credit.

19 Q. Do you know when the decision was made to
20 seek additional financing? Basically the
21 refinancing proposal.

22 A. I saw a letter as I arrived here -- the
23 June letter, which I wasn't aware of before,
24 showing it went back to June.

1 Q. At the bottom of that summary you have,
2 "Request for multiple trade letters a sure tip-off
3 of severe problems." What's that reference to?

4 A. Well, the letter actually refers to -- let
5 me get the quote from that -- I have to put tabs in
6 this thing. Here we go. This is the October 6
7 letter, refers to "Our key vendors who are
8 currently feeling the impact of our AP squeeze."

9 Satisfactory bank customers do not have an
10 AP squeeze. Satisfactory bank customers do not go
11 to a bank and ask for 16 letters to vendors. Okay.
12 All I can tell you is, there are some things that
13 banks do that are prudent, there are some things
14 they do maybe aren't prudent, but there's a
15 majority of banks who feel -- and there are some
16 things that banks do that most banks would never
17 think of doing. This is the latter.

18 Q. In --

19 A. Excuse me. And also this idea of hand
20 carrying the letter to the vendors, again it's
21 unheard of.

22 Q. If a bank's customer is having difficulties
23 with its vendors and asks the bank to provide
24 information to those vendors, is it your position

1 that the bank should not?

2 A. Please repeat that again.

3 Q. If a bank customer is having difficulties
4 with its vendors and seeks information from the
5 bank, in order to assist it with its vendors, is it
6 your position the bank should not assist its
7 customers in that regard?

8 A. No, but there's a way that it should
9 happen.

10 Q. How should it happen?

11 A. It should happen that Preble -- we'll use
12 the present as a hypothetical for names. Preble
13 should have gone to whichever customer they were
14 concerned about and invited them to check into the
15 bank.

16 It would not have been inappropriate to
17 tell the bank that they may be receiving some
18 calls. But this way the bank could have understood
19 who the inquirer was, what the purpose of the
20 inquiry was, what kind of credit was being
21 extended. That's the way it should have happened.

22 It didn't happen that way here. And if you
23 read both the Robert Morris materials and the
24 bank's own policies, it always starts with a

1 request, an inquiry from the third party, not from
2 other sources.

3 Q. Okay. So it is your position that -- that
4 a bank may not provide an unsolicited report to
5 vendors of a bank customer, even if the customer is
6 asking it to do so?

7 A. Unsolicited from the recipient of the
8 information, that's correct.

9 Q. And other than the RMA discussion of the
10 manner in which a credit request should be handled,
11 are you aware of any other written document that
12 discusses that issue?

13 A. Yes, KSB's own policies.

14 Q. Outside of the bank in the industry are you
15 aware of anything that says, as opposed to advising
16 a bank as to how it should respond to a credit
17 request that it -- are you aware of any document
18 that says you may not provide this information at
19 the request of your customer without a specific
20 request?

21 A. I have seen specific documents prohibiting
22 volunteering information. I can recall, as a
23 trainee at Bank of Boston in 1969, being told by
24 Clinton Parkinson, the icy steal head of the credit

1 department, the first thing I came in the door was,
2 "You do not volunteer information."

3 Q. I'm not asking about volunteering
4 information, I'm asking you about when the customer
5 requests the bank to provide information to
6 vendors, are you aware of anything, other than the
7 RMA document, that tells the bank -- or in the
8 industry that tells banks you may not do that, you
9 may not provide information to third parties at the
10 request of your customer, without a specific
11 inquiry?

12 A. I can't recall other documents, although I
13 have seen them.

14 Q. Do you think that a bank in the position of
15 Kennebunk Savings Bank has an obligation to work
16 with its customer to assist it in continuing its
17 business relationships with its vendors?

18 A. Within certain parameters, yes.

19 Q. In fact, to fairly do that would be, in
20 your view, a violation of the bank's obligation?

21 A. It's not that cut and dried. If you read
22 my book The Workout Manual, it tells you under what
23 circumstances a bank should work with its customer.
24 And I'd be happy to give you a copy for \$28 today,

1 if you haven't gotten it already.

2 Q. Would you --

3 A. I mean I have to pay for them for myself.
4 I'm not being a wise guy, but I have it here.

5 Q. Is it your position that none of the
6 characterizations provided under the RMA
7 guidelines, that is satisfactory, generally
8 satisfactory or unsatisfactory, would be
9 appropriate to describe KSB's relationship with
10 Preble as of October of 2004?

11 A. I think -- well, they could have said
12 generally satisfactory, but with certain caveats,
13 such as -- by the way, they're book insolvent,
14 they're losing money hand over fist and they have
15 an accounts payable squeeze. That's why -- to
16 explain it.

17 By saying, "generally satisfactory," that
18 would prompt a need for further inquiry from the
19 vendor. They could have also said unsatisfactory,
20 which is what I think it was or they could have
21 said nothing, other than to give factual
22 information you know: Balances, loan balances, and
23 no indication.

24 And again if you read the October 6 letter,

1 although the October 8 letter doesn't say, "This is
2 a recommendation to extend more credit," in effect
3 that's what they were asked for and that's what
4 they complied with.

5 They knew that these vendors receiving that
6 letter were being asked to provide additional
7 credit at that time based on the October 6 letter.

8 Q. What is the bank's obligation to its
9 customer, if it's asked to provide information to
10 vendors, if the bank feels that any
11 characterization of its relationship should be
12 characterized as unsatisfactory?

13 A. I think the bank should tell the
14 customer -- it's almost like getting a personal
15 reference. If someone asks you for a reference and
16 you know it's going to be negative, most people
17 would feel an obligation to tell that person, "If
18 you put me down as a reference, it's going to be
19 negative." I think the same applies here.

20 On the other hand, they could have
21 answered, as long as they answered properly, which
22 they did not.

23 Q. You said, "could have answered, as long as
24 they answered properly." Is it fair to say that

1 what you're saying is what the bank had to tell
2 Preble, in your opinion as of October, was we can't
3 provide this information because if we answer
4 properly, your vendors are going to stop dealing
5 with you?

6 A. There were so many parts to that question,
7 I don't think I can give you a simple yes or no
8 answer to that, without misleading the Court.

9 Q. Okay. Let's back up. You have indicated
10 that obviously the bank needs to explain to its
11 customer what it needs to say to any third party,
12 before it provides any information at the
13 customer's request, correct?

14 A. They have no duty to do that, but I would
15 say that that would be an appropriate way to handle
16 it.

17 Q. If they don't do it and they provide
18 additional information to a bank's customer, they
19 may have violated banking regulations, isn't that
20 correct?

21 A. It depends on what additional information
22 they give and what state you're in.

23 Q. Do you know what the statutory references
24 in Maine for dealing with the extent to which bank

1 information in commercial settings is confidential
2 or not?

3 A. I've seen it. I don't recall exactly what
4 it was, but I did not believe that it would inhibit
5 the fair exchange of commercial information within
6 the Robert Morris guidelines -- excuse me, Risk
7 Management Association guidelines.

8 Q. What's the basis for that opinion?

9 A. I've done a lot of work in Maine. I've
10 seen that opinion several times because I'm told
11 that Maine law is a little bit more stringent than
12 Massachusetts law and regulations in that regard.

13 So I've seen it in the past, but I did not
14 walk away with a photographic memory of exactly
15 what it says. I know that Maine is more
16 restrictive than Massachusetts. I'm much more
17 familiar with Massachusetts, but I do not believe,
18 as I sit here today, that either state would
19 restrict the kinds of information that we're
20 talking about here -- the proper exchange under
21 Robert Morris guidelines.

22 Q. The RMA guidelines require that any
23 characterization of the bank's relationship be
24 expressed in a manner in which the recipient will

1 understand what that information means, correct?

2 A. Yes.

3 Q. How is that accomplished in real life?

4 A. I think in real life if you have a credit,
5 such as Preble, which is not satisfactory -- and we
6 can debate whether it was generally satisfactory or
7 unsatisfactory -- they should have taken -- just to
8 say satisfactory, that's saying that Preble was an
9 A or B student. They weren't an A or B student
10 here, they were far from it. So that was very
11 misleading to say satisfactory.

12 And all I would say is that -- you know
13 just because I'm an experienced banker and I've
14 dealt with these matters for a long time. I think
15 there are going to be a lot of people observing
16 this case that are going to find the use of
17 "satisfactory" to be absurd, given the economic
18 reality of Preble.

19 Q. If the customer asks its bank to confirm to
20 its vendors there is, in fact, a refinancing that
21 is being undertaken, what's the bank's obligation
22 in that situation?

23 A. I think it could be stated factually,
24 however, if the bank believes that the probability

1 of that refinancing to be relatively low, I would
2 not recommend that any bank do that. And I saw
3 this June letter with great interest because what
4 it says was that either the SBA or its alter ego
5 SEI, was not willing to subordinate back in June.

6 And that was obviously a key to the
7 financing. And although, obviously the bank made
8 another run at them for approval, I would say that
9 under those circumstances it was not appropriate.

10 Q. Which letter are you referring to?

11 A. The one I cited as an additional document.
12 Is it June?

13 MR. KORNITSKY: It's here. I'm not sure if
14 it's that one or not.

15 A. No. There was a June letter -- I recall a
16 June letter, which basically asks -- where CEI
17 informs the bank that they're not willing to
18 subordinate.

19 MR. KORNITSKY: That's the one you said --

20 A. June 15. There is an internal memo -- I'm
21 sorry, I cited this earlier as a bank a memo. It's
22 CEI internal memo. May I read it?

23 Q. Sure.

24 A. "On June 3, 2004 I received a request from

1 Eric Andrews from CEI to subordinate our position
2 on the remaining Westfield road property to allow
3 the bank to collateralize the renewal of a letter
4 of credit for the Portland Fish Exchange in the
5 amount of \$100,000.

6 "After reviewing the file and
7 Eric's analysis, I am not willing to do so at this
8 time. I spoke with Eric today, 06/15/04, and
9 explained our position."

10 Q. Did you have any -- at that point do you
11 know whether there had been any discussions with
12 SBA or any of the -- I'm using SBA to include
13 Coastal and its regulated entities --

14 A. Fair game.

15 Q. Did -- do you know whether at that point
16 there had been any refinancing proposal, beyond
17 just a discussion of how they were going to handle
18 the letter of credit?

19 A. I don't. Prior to seeing this letter, the
20 first indication I had was -- I'm not sure when
21 this was -- it was either late summer or early fall
22 about the time of the letter, which showed the
23 concept of the restructuring emerging.

24 So I would say at least a part of it. I

1 don't think that's the whole restructuring, but at
2 least a piece of it they've been told not to expect
3 a subordination. Nor is it common for the SBA to
4 subordinate, unless they believe the borrower's
5 extremely viable.

6 It's very uncommon, first of all, for them
7 to subordinate. But certainly in situations where
8 you know if they feel the trends and the quality of
9 company is not satisfactory.

10 Q. Do you know what experience Mr. Andrews had
11 had with the SBA in similar types of refinancing
12 and in request to the SBA to subordinate its
13 financing?

14 A. May I refer to my notes?

15 Q. Sure.

16 A. (Referring.) Well, it's not captured in my
17 notes. Let me just check, I have some right here.
18 Excuse me, I'm going to make a note on this, I just
19 saw something interesting.

20 Q. What's that?

21 A. Andrews -- 58 to 59. I was aware of this,
22 but didn't have it in my notes. "Several out of
23 formula instances earlier in the year." Andrews,
24 page 83, "SBA did not share his optimism for a

1 future outlook." Again that's my summary of what
2 it said.

3 Q. Do you know when that was?

4 A. I believe it was probably after the date of
5 the letter.

6 Q. Do you know more specifically than "after
7 the date of the letter"?

8 A. I'd have to check the deposition. I think
9 it fixes it fairly -- fairly precisely, but I
10 wouldn't hazard to give a date right now. I see
11 nothing in my notes. I'm not saying it's not in
12 the deposition. I don't recall whether it was
13 asked or not, but it's certainly not in my notes.

14 Q. Do you know whether there was any
15 indication from the SBA that it would not
16 subordinate its position with regard to the actual
17 refinancing package at any time prior to the
18 December 15 meeting?

19 A. No, although I would say that the June 15
20 letter was a sneak preview.

21 Q. Do you know where the Westfield road
22 property is?

23 A. Not offhand.

24 Q. Do you know how many parcels of property

1 were owned by Preble?

2 A. I know there were several and it was based
3 on the loan presentations of Preble or its
4 affiliates.

5 Q. On page 2 of your summary of notes we start
6 with, "Also pending possible events not disclosed."
7 What does that mean?

8 A. As a general rule, you did not -- you keep
9 your reprise factual and you do not speculate as to
10 what the future will hold.

11 Q. And with regard to the October 8 letter
12 what -- in what way did that letter violate that?

13 A. It is reference to a pending refinancing.

14 Q. If a customer asks the bank to confirm that
15 a pending refinance -- that there is a pending
16 refinancing, is it your position that the bank
17 ought not do that?

18 A. Again credit's an interesting thing. You
19 have to take the specific circumstances. But if,
20 in fact, the relationship is not satisfactory and
21 you say it's satisfactory and then reference a
22 refinancing, I think the combination there is just
23 like a combination of bad drugs. You get a
24 negative reaction. It should not have been done in

1 that context.

2 Q. Okay. My question is, obviously the bank
3 has at least enough confidence that it's willing to
4 go forward with the refinancing from its --

5 A. No without a crutch from the SBA.

6 Q. But it is willing to go forward with the
7 refinancing --

8 MR. KORNITSKY: I'm going to object to that
9 question. Are you saying that -- is that a
10 statement that you're making that the bank was
11 willing to go forward?

12 Q. The bank had made a refinancing proposal
13 indicating that it was willing to refinance Preble,
14 albeit contingent upon subordination from the SBA,
15 correct?

16 MR. KORNITSKY: I'm going to object.

17 A. I believe you're correct, although I would
18 also say that I have not seen commitment letters
19 following that meeting. So, yes, there was an
20 approval document signed. Whether commitment
21 letters were ever sent out, I don't know. I just
22 can't recall.

23 Q. And I'm going to ask you to assume that we
24 have a situation in which one of the things that

1 the bank customer is doing is telling its vendors,
2 "We are hopeful that we'll have a refinancing and
3 that one is pending," and some of the customers are
4 concerned. What proof do we have that there's even
5 a refinancing proposal pending?

6 A customer wants the bank to confirm for
7 their vendors, yes, we have applied and there is a
8 refinancing proposal pending. Is it your position
9 that it is inappropriate for the bank to provide
10 that information directly to the vendors?

11 A. Yes, it is inappropriate in the context
12 that we have here.

13 Q. Why?

14 A. Robert Morris says, if you choose to
15 answer, you answer fully. And to tell a vendor
16 that that is a satisfactory relationship and that
17 a -- and a refinancing is pending, would lead that
18 person to believe that things were much rosier than
19 they actually were.

20 I think that that combination of facts in
21 the letter was highly misleading.

22 Q. Not focusing just on the letter right now,
23 my question is, if a customer asks the bank to
24 confirm to its vendors that a refinancing proposal

1 is pending, may the bank do so?

2 A. They may, as long as they disclose the
3 proper posture of -- the financial posture of the
4 credit and not gild a lily, as we're saying.

5 Q. If the customer says to the bank, "I'm
6 going to have my vendor call you" -- I'll take out
7 the unsolicited nature. "I'm going to have my
8 customer call you and I want their -- they're going
9 to ask you, 'Is the refinancing plan pending?'
10 What I want you to do is confirm for them that it
11 is," may the bank do that without more?

12 A. No.

13 Q. If the customer calls the bank and says,
14 "Your customer has asked me whether there is a
15 refinancing plan pending?" What is the bank's
16 appropriate response?

17 A. As I testified earlier, one possible
18 response would be to say, "Yes, there is a
19 refinancing pending, however, please do not accept
20 any -- any inference that it's going to happen,
21 this is a credit that is in flux. And that while
22 working with them and they've been a customer for a
23 while this is a -- less than satisfactory
24 situation."

1 Q. May the bank make that response without
2 getting prior approval of its customer?

3 MR. KORNITSKY: Objection. I'm wondering
4 if you want to hear my objection?

5 MR. BOWIE: Go ahead. Yeah, I'm curious,
6 to be honest with you.

7 MR. KORNITSKY: I'm wondering, may the bank
8 under Maine law, Massachusetts law? That's
9 the first part that I would say -- I know we
10 still have that question that's live.

11 A. Repeat the question, please.

12 Q. If we're at the hypothetical where the
13 vendor has called the bank and said in effect, "I
14 understand that you have a refinancing pending with
15 your customer, is that true," and my question was,
16 "What could the bank respond?"

17 And I think you told me that it can, but
18 not with a simple yes or no, there needed to be
19 additional information, is that a fair summary of
20 what you just told me?

21 A. Yes.

22 Q. My question is, may the bank provide that
23 additional information, without the prior approval
24 of its customer?

1 A. I believe if I did not have -- when I --
2 not what I would do, but a typical banker. If they
3 didn't have the customer's consent to speak with
4 the vendor, I think they would just decline to
5 comment, is one alternative, or to simply say
6 that -- well, something that would in amount -- you
7 decline to comment.

8 How many words you use, is up to the
9 person.

10 Q. Under "To do slash questions," you have
11 one, two, three, four -- the fifth entry down, if
12 you will, "Did plaintiff ever see Preble
13 financials, either directly or via credit bureaus."
14 What's that reference to?

15 A. It simply -- I was curious as to whether
16 Preble had additional information from other
17 sources that would have a bearing on their credit
18 decision. And this morning -- or at lunchtime I
19 did see the -- the industry credit report, which
20 did not have any financial information on it.

21 Q. When you say, "Preble," do you mean Preble
22 or do you mean the plaintiffs in this case?

23 A. I'm sorry, the plaintiff's. I'm sorry.

24 Q. Then the next question is, "When further

1 downgraded slash two-bagger," what does that mean?

2 A. Well, basically, as I testified earlier,
3 this thing should have been downgraded to
4 substandard sometime in the summer, if not before,
5 of '04. And given the September 30 financials, if
6 not before, this thing should have either gone to
7 substandard or probably doubtful, depending on the
8 bank's comfort with the collateral.

9 And "two-bagger," simply refers to a
10 situation where if a banker has a two digit
11 downgrade, then -- if they were Japanese -- they
12 would be obligated to take their life.

13 Q. On what basis do you believe that it should
14 have been -- Preble should have been downgraded in
15 the summer?

16 A. Because on a full following basis, if a
17 company's losing money, as it ultimately was proven
18 in the September financials, you see it in the
19 collateral -- you'll see it in the collateral
20 report. In other words, losses do not come out of
21 thin air, they come out of collateral.

22 Q. The next question is, "reconsider use of
23 quote available end quote credit in exhibit 23."
24 What's that reference to?

1 A. I'm not sure. I would have to go back and
2 look. It almost -- it almost ties to the question
3 up above, "paying the line down so aggressively."
4 I just did not do a full availability analysis
5 here.

6 And it was just a question. I don't think
7 it's something I'm going to pursue. I also know
8 that the collateral coverage was thin here and
9 certainly not up to the bank policy, but perhaps
10 somewhat adequate. I didn't do a collateral
11 analysis either.

12 MR. BOWIE: Can we take a minute.

13 (A recess was taken.)

14 MR. BOWIE: I have no further questions at
15 this point. Marc, I'd like a copy, as I said
16 of the file. I don't care how we do that,
17 whatever's easiest and most expeditious to
18 allow Mr. Clarke to have his file and for me
19 to have a copy.

20 MR. KORNITSKY: What I'm going to propose
21 that I do is that I would take it, have my
22 paralegal make a complete copy of everything
23 and return the original to Mr. Clarke. I'll
24 make a copy for you a -- I'll make two copies

1 for you, I'll make one for Susan as well, and
2 one for myself and I'll ship it out tomorrow.

3 (The deposition concluded at 3:30 p.m.)

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SIGNATURE PAGE FOR DEPONENT

I, the undersigned _____ do
 hereby certify that I have read the foregoing and
 that to the best of my knowledge, said deposition
 is true and accurate (with the exception of the
 following desired changes listed (below):

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Subscribed and sworn before me this _____ day of
 _____, 20____.

EXP. DATE: _____ NOTARY PUBLIC _____


C E R T I F I C A T E

I, ALLYSON M. DANFORTH, RPR, a Notary Public in and for the County of Essex, Commonwealth of Massachusetts, do hereby certify that the within-named deponent was sworn to testify the truth, the whole truth, and nothing but the truth, in the aforementioned cause of action.

I further certify that this deposition was stenographically reported by me and later reduced to print through Computer-Aided Transcription, and the foregoing is a full and true record of the testimony given by the deponent.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF, I have hereunto affixed my hand and official seal this 25th day of April, 2006.


ALLYSON M. DANFORTH, RPR,
Notary Public,
Commonwealth of Massachusetts

My Commission Expires:
August 8, 2008